Ontario

BOARD OF INQUIRY (*Human Rights Code*)

IN THE MATTER OF the Ontario *Human Rights Code*, R.S.O. 1990, c. H.19, as amended;

AND IN THE MATTER OF the complaints by Jean-Marc Lang August 31, 1998 and December 15, 1998 alleging discrimination in services because of ethnic origin and ancestry.

B E T W E E N:

Ontario Human Rights Commission

-and-

Jean-Marc Lang

Complainant

-and-

Her Majesty the Queen in Right of Ontario as represented by the Ministry of Community and Social Services and Enfants en Peril (Children at Risk)

Respondents

INTERIM DECISION

Adjudicator: Steven J. Faughnan

Date: November 22, 2002

Board File No.: BI-396-01 to BI-0397-01

Decision No.: 02-020-I

Board of Inquiry *(Human Rights Code)*
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ISSUE

This interim decision deals with a request in writing by the Respondent Her Majesty the Queen in Right of Ontario as represented by the Ministry of Community and Social Services ("MCSS") to have the case proceed in the stages proposed in a letter from MCSS dated April 24, 2002. The motion is supported by the Respondent Enfants en Peril (Children at Risk) ("Children at Risk") but opposed by the Complainant and the Ontario Human Rights Commission (the "Commission").

DECISION

MCSS's motion is denied.

THE PARTIES' POSITIONS

The Position of the Respondents

In its letter MCSS followed up on its proposal, discussed during a case management-prehearing telephone conference call held on April 17, 2002, that the matter be heard in stages. MCSS's proposal was set out in the following way:

> At the outset we wish to indicate that this proposal is based on our understanding of the theory of the Commission's case as set out in the Pleading filed by the Commission on March 23, 2001. It is our understanding that the Commission's claim is that the first Respondent, Children at Risk, discriminated against the complainant because its services were not offered in French. The second Respondent, the Ministry of Community and Social Services, infringed the Code because it funded Children at Risk "knowing that the latter was providing its services in a discriminatory way" (see paras. 35 and 37 of the Commission's Pleading).
>
> Accordingly, it is our proposal that the case proceed in the following order:
>
> i) Part 1 – Did the Respondent, Children at Risk, infringe the Code?
>
> ii) Part 2 – Did the Respondent, Ministry of Community and Social Services infringe the Code?
>
> We propose that the first part deal with all of the legal and evidentiary issues relating to the allegations against Children at Risk, and that all parties participate. These would include:

i) Did Children at Risk provide services which were not available at Francophone nursery Schools?

ii) Did Children at Risk have an obligation under the *Code* to make its services available on a bilingual/multilingual basis?

iii) Did Children at Risk offer "reasonable accommodation" to the Complainant?

After the completion of the first part of the hearing, the Board will consider whether it can make any factual or legal determinations in relation to the first Respondent.

Depending upon the Board's answers to any of these questions, the second Respondent will have a better idea of the case it has to meet, and the first Respondent could be permitted to end its participation in the proceedings.

In proposing this order we wish to emphasize that we are not asking the Board to make any preliminary legal determination or decide any "points of law" in the absence of a factual foundation. The Respondents are of the view that a proper factual context is necessary to resolve all of these legal questions. It is our view, however, that the Commission's case has two parts, and the second part is contingent on the determinations made in the first. Accordingly, the Board should have an opportunity to make rulings at the end of the first part of the hearings. While this proposed order *will not necessarily shorten the hearing* (emphasis added), it will give the Board an opportunity to make factual and legal determinations which could shorten the hearing, or depending upon the legal and factual determinations which may be made, could focus Part 2 of the case.

In our view, the primary benefits of proceeding in this manner include the establishment of a proper factual context for the legal questions raised in Part 1, the fact that the factual and legal findings which may be made in Part 2 are contingent on the findings in relation to Part 1, and the possibility of shortening the hearing.

Children at Risk supports MCSS's proposal. Children at Risk submits that this would allow it "to enter all of its evidence at the first part of the hearing, make its legal arguments with respect to the findings that ought to be made against it and then retire from the hearing process". This, it says, would provide a good opportunity to limit the time and expense incurred by Children at Risk. Their support for the proposal is based on its understanding that the Commission's claim is that Children at Risk discriminated against the Complainant because its services, specifically the Thursday's Child Nursery Program, were not offered in French.

The Position of the Commission and the Complainant

The Commission and the Complainant both submit that hearing the matter in stages risks delaying the proceedings.

In its letter dated April 29, 2002, the Commission sets out its position in the following way:

> Bien qu'en principe la proposition de scinder l'audience telle que suggérée par Me Charney nous apparaît raisonnable, elle n'est pas véritablement pratique puisqu'à notre avis, elle risque de causer des délais. Maintenant que les parties ont convenu d'un calendrier pour l'audience de cette affaire, nous favorisons une procédure ininterrompue du début à la fin. Nous sommes d'avis, qu'en raison de la complexité et de l'importance des questions soulevées par ce litige, la Commission d'enquête voudra s'accorder une période considérable de réflexion afin de trancher ce litige, tant dans sa première composante que la seconde. Ayant convenu d'un calendrier très serré, comportant des semaines consécutives pour l'audience de cette affaire, notamment, au mois d'avril 2003, nous sommes d'avis que le risque de causer un délai avec la proposition des intimés excède les bénéfices suggérés, et qui, soit dit en passant, favorisent uniquement les intimés.
>
> Néanmoins, nous invitons les intimés à nous faire part d'un projet écrit d'énoncé conjoint des faits portant sur toutes les questions afférentes à ce litige dans les plus brefs délais, puisqu'ils semblent si intéressés de raccourcir les délais et minimiser les coûts engendrés par ce litige. Procéder à l'aide d'un énoncé conjoint des faits rencontreraient toutes leurs préoccupations et accorderaient aux deux parties le bénéfice d'une décision, qui nous l'espérons, nous serait rendue avant la fin de cette année. À notre avis, les faits sont forts simples et il serait malheureux de devoir consommer de précieux jours d'audiences sur des faits qui sont, en grande partie, non-contestés. Cependant, même si nous sommes incapables de régler toutes les questions de faits avant le début de l'audience, nous sommes d'avis que de procéder à l'aide d'un énoncé conjoint des faits épargnera temps et efforts aux parties à tous les niveaux.
>
> Or, à la lumière de ce qui précède, nous demandons à la Commission d'enquête de rejeter la proposition de Me Charney, appuyée par Me McIsaac, a moins que nous obtenions des assurances qu'aucun délai ne sera engendré par cette démarche. De façon subsidiaire, nous invitons la Commission d'enquête, et les intimés, d'étudier notre proposition de procéder partiellement ou totalement à l'aide d'un énoncé conjoints des faits, afin de véritablement effectuer des épargnes à tous les niveaux.

In a letter dated May 8, 2002 the position of the Complainant is set out as follows:

> Nous avons examiné les documents se rapportant à la prise de position des parties et avons conclu (après avoir révisé les documents qui furent déposés devant la Commission des Droits de la Personne) qu'il ne serait pas souhaitable pour la partie plaignante de scinder l'audience quant à la responsabilité respective des intimés.
>
> Ceci étant dit, nous sommes en accord avec la prise de position de la Commission, représentée par Me Champagne, en ce qui suit: << elle n'est pas véritablement pratique puisqu'à notre avis, elle risque de causer des délais.>> en ce qui a trait à la motion apportée par les parties intimées.
>
> D'autant plus, nous sommes convaincus que les parties intimées sont mutuellement liées et interdépendantes l'une à l'autre pour l'équité de la cause.
>
> Notre motivation à cet égard est basée sur le dépôt des plaintes et son cheminement vers la Commission d'enquête.

The letter then recounts the history of the complaints and the events leading up to their referral to the Board and ends with the following:

> À notre avis, les intimés demandent maintenant à la Commission d'enquête de scinder l'audience et de rendre indépendamment une décision après avoir seulement entendu une partie de la preuve. Cette proposition risque de causer des délais considérables si une des parties décidait d'interjeter appel à la décision rendue et nous croyons que cette mesure serait préjudiciable à la cause de notre enfant.
>
> Nous craignons également qu'il se puisse fort bien que la majorité des témoins soient requis pour témoigner en deux instances (se rattachant au même litige) si l'audience était sectionnée. Cette façon de faire pourrait, encore une fois, causer des délais irraisonnables pour toutes les parties.
>
> Nous croyons que les intimés devraient être mutuellement retenus à la présente cause en fonction du motif initial de notre plainte, ce qui fut le refus de services égaux (tel que les services pour la population anglophone) pour notre enfant.
>
> Cette procédure, selon notre avis, est juste et équitable et ne défavorise pas les parties intimés.

ANALYSIS

Dividing or bifurcating a hearing and determining issues serially, especially in the face of an objection, should be done only in the clearest of cases and only if the hearing of the matter in stages would result in a fairer and more efficient and expeditious hearing overall. Amongst other things, when exercising its discretion in deciding whether to hear issues serially, the Board balances the risk of possible delay against the convenience to the parties of dividing the proceedings. (See generally the discussion in *Odell v. Toronto Transit Comm. (No. 1)* (2001), 39 C.H.R.R. D/200 (Ont. Bd. Inq.) and *Hyman v. Southam Murray Printing and International Brotherhood of Teamsters, Local 419* (1981), 3 C.H.R.R. D/680 (Ont. Bd. Inq.))

Turning to the specific request, the Board is not satisfied that the complex issues of liability that are raised in this case can be so neatly delineated along the lines set out in MCSS's letter. If the matter is heard in stages there could be a duplication or overlap of evidence from witnesses on the issue of accommodation to the point of undue hardship, and the role, if any, that the MCSS has in program delivery and funding both with respect to Children at Risk and in general. There may also be an overlap of witnesses on the issue of damages and remedy.

The Board is also concerned that, although the Respondents have the best of intentions, hearing the issues serially could result in gaps in, or the absence of, evidence that the Board may need to consider prior to rendering any determination that deals with liability. Furthermore, the hearing may be delayed if time to deliberate is needed between the first and second stages. If this occurs mutually convenient hearing dates may be lost. The scheduling of the current hearing dates in this matter was challenging because of the limited availability of the Board and the numerous legal counsel involved in this proceeding. If it becomes necessary, there may very well be great difficulty arranging agreeable replacement hearing dates that would allow the hearing to resume in a timely fashion.

In its own letter MCSS acknowledges that there is no certainty that its proposal will shorten the hearing.

The Board is therefore not satisfied that that hearing of the matter in the stages proposed by MCSS would result in a fairer, more efficient and expeditious hearing overall. The risk of possible delay in hearing the matter in the stages suggested by MCSS outweighs any convenience asserted by the Respondents. Accordingly, MCSS's motion is denied.

That being said, the Board invites the parties to consider other ways to achieve the laudable goals of a fair, efficient, expeditious and less costly hearing. In that regard there is merit to the Commission's invitation to the parties to formulate an agreed statement of facts. To that end, if the parties feel it is of some use, the Board offers the services of a mediator to assist them. The parties need only contact the Registrar to request a mediator's assistance.

ORDER

1. The motion by MCSS to have this matter heard in the stages set out in its letter dated April 24, 2002 is denied.

Dated at Toronto, this 22nd day of November, 2002

Steven J. Faughnan
Vice-Chair